

APR 26 2007

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

Appellants: John C. Oslund et al. Attorney Docket: ev31010USD1  
Serial No.: 10/823,139 Group Art Unit: 3731  
Filed: April 13, 2004 Examiner: Darwin P. Erez  
For: DISTAL PROTECTION DEVICE

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**APPEAL BRIEF**

Mail Stop Appeal Brief - Patents  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Dear Sir:

This Appeal Brief is presented in support of the Notice of Appeal to the Board of Patent Appeals and Interferences, filed February 20, 2007, from the Final Rejection of claims 71 to 73, 75 to 77, and 79 to 81 of the above-identified application, as set forth in the Final Office Action mailed October 17, 2006. Please charge Deposit Account No. 16-2312 in the amount of \$620.00 to cover the fee for filing an appeal brief (\$500.00) and the fee for a one month extension of time (\$120.00). Appellants respectfully request reconsideration and reversal of the Examiner's rejection of the pending claims.

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Date: April 26, 2007Signature: Jodi JungName: Jodi Jung

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As required by 37 C.F.R. § 41.37, this Brief contains the following items under the headings and in the order suggested therein.

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### **(1) REAL PARTY IN INTEREST**

The real party in interest of the above-captioned patent application is the assignee, ev3 Inc.

### **(2) RELATED APPEALS AND INTERFERENCES**

There are no other appeals or interferences known to Appellants or Appellants' representative that will have a bearing on the Board's decision in the present appeal.

### **(3) STATUS OF CLAIMS**

Claims 1 to 70 are cancelled. Claims 71 to 82 are pending in this application. The Examiner withdrew claims 74, 78, and 82 as being drawn to a nonelected species. Claims 71 to 73, 75 to 77, and 79 to 81 are rejected and are the subject of this appeal.

### **(4) STATUS OF AMENDMENTS**

On October 17, 2006, the Examiner issued a Final Office Action. No amendments to the claims have been made since the Final Office Action.

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## **(5) SUMMARY OF CLAIMED SUBJECT MATTER**

The invention as claimed in claim 71 relates to a distal protection device 10 disposable within a vessel of a body (FIG. 1, page 6, lines 27 and 28). The distal protection device 10 comprises: a guidewire 20 (FIGS. 1, 8, and 12, page 6, line 29, to page 7, line 4); a tube 16 (ferrule 16, FIGS. 1, 8, and 12, page 7, lines 5 to 8) having a lumen sized to receive the guidewire 20; a filter basket 12 connected to the tube 16 (FIGS. 1, 8, and 12, page 6, line 29, to page 7, line 8), the filter basket 12 having a closed distal end and an open proximal end (FIGS. 8 and 12, page 6, lines 29 and 30); and a spacing member 28, 44 (FIGS. 8 and 12). The spacing member 28, 44 is connected to the tube 16 and positioned proximally of the proximal end of the filter basket 12 (FIGS. 8 and 12), and the spacing member 28, 44 is configured to maintain the proximal end of the filter basket 12 in an opened configuration when the device is deployed within the vessel (FIGS. 8 and 12, page 9, lines 3 to 16).

The invention as claimed in claim 75 relates to a distal protection device 10 disposable within a vessel of a body (FIG. 1, page 6, lines 27 and 28). The distal protection device 10 comprises: a guidewire 20 (FIGS. 1, 8, and 12, page 6, line 29, to page 7, line 4); a tube 16 (ferrule 16, FIGS. 1, 8, and 12, page 7, lines 5 to 8) having a lumen sized to receive the guidewire 20; a filter basket 12 connected to the tube 16 (FIGS. 1, 8, and 12, page 6, line 29, to page 7, line 8), the filter basket 12 having a closed distal end and an open proximal end (FIGS. 8 and 12, page 6, lines 29 and 30); and a spacing member 28, 44 (FIGS. 8 and 12). The spacing member 28, 44 has a first portion connected to the tube 16 and a second portion opposite the first portion which is configured to contact an inner wall of the vessel at a point of engagement when the device 10 is deployed in the vessel to space the

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guidewire 20 a desired distance from the point of engagement (FIGS. 8 and 12, page 9, lines 3 to 16). The spacing member 28, 44 is positioned proximally of the proximal end of the filter basket 12 (FIGS. 8 and 12).

The invention as claimed in claim 79 relates to a distal protection device 10 disposable within a vessel of a body (FIG. 1, page 6, lines 27 and 28). The distal protection device 10 comprises: a guidewire 20 (FIGS. 1, 8, and 12, page 6, line 29, to page 7, line 4); a tube 16 (ferrule 16, FIGS. 1, 8, and 12, page 7, lines 5 to 8) having a lumen sized to receive the guidewire 20; a filter basket 12 connected to the tube 16 (FIGS. 1, 8, and 12, page 6, line 29, to page 7, line 8), the filter basket 12 having a closed distal end and an open proximal end (FIGS. 8 and 12, page 6, lines 29 and 30); and a spacing member 28, 44 (FIGS. 8 and 12). The spacing member 28, 44 has first and second opposing portions, the first portion being connected to the tube 16, and the second portion being configured to contact an inner wall of the vessel at a point of engagement when the device 10 is deployed in the vessel such that the guidewire 20 is urged in a direction away from the point of engagement (FIGS. 8 and 12, page 9, lines 3 to 16). The spacing member 28, 44 is positioned proximally of the proximal end of the filter basket 12 (FIGS. 8 and 12).

This summary does not provide an exhaustive or exclusive view of the present subject matter, and Appellants refer to the appended claims and their legal equivalents for a description of the invention.

#### **(6) GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL**

Claims 71 to 73, 75 to 77, and 79 to 81 were rejected under 35 U.S.C. § 102(e) as anticipated by U.S. Patent No. 6,129,739 to Khosravi ("Khosravi").

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## (7) ARGUMENT

### A. Rejection Under 35 U.S.C. § 102(e) as anticipated by Khosravi

The Examiner rejected claims 71 to 73, 75 to 77, and 79 to 81 over Khosravi. Khosravi does not teach or suggest a spacing member positioned proximally of the proximal end of the filter basket as recited in the pending claims. In the October 17, 2006 Final Office Action, the Examiner stated that Khosravi shows a spacing member 135 positioned proximally of the proximal end of the filter basket. In the January 16, 2007 Response, Appellants responded that in the description of Figures 11A to 11C, Khosravi states that “[b]lood permeable sac 136 is wrapped around and attached to itself all along its perimeter, creating hem bond 140 and lumen 141” (column 10, lines 14 to 16), “[l]umen 141 is configured to receive spines 137 and 138” (column 10, lines 16 and 17), and “hoop 135 comprises spines 137 and 138” (column 10, line 10). Thus, it is clear from Figures 11A to 11C and the description of these figures that spines 137 and 138 of hoop 135 are surrounded by sac 136 and spines 137 and 138 are distal to a portion of sac 136. Therefore, Khosravi does not teach or suggest a spacing member positioned proximally of the proximal end of a filter basket, as recited in the pending claims.

In the February 26, 2007 Advisory Action, the Examiner stated:

The applicant argued that the Khosvari reference fails to disclose a spacing member that is positioned proximally of the proximal end of the filter basket. However, the examiner is only considering the portion of the blood permeable sac 136 that is capable of filtering as the “the filter basket”. That is, only the portion of the sac 136 that is not hemmed is viewed as the filter basket. Hem bond 140 is not capable of filtering or has limited filtering capabilities because of the its attachment around the spines 137 and 138. Therefore, the hem bond is not viewed as being a part of a “filtering” basket and is

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located proximally to the portion of the blood permeable sac that is capable of filtering.

Appellants disagree. Khosravi states that blood permeable sac 136 is wrapped around and attached to itself all along its perimeter, creating hem bond 140 and lumen 141, which receives spines 137 and 138. Column 10, lines 14 to 17, of Khosravi. As shown in Figures 11A to 11C, spines 137 and 138 are distal to a portion of sac 136. Specifically, spines 137 and 138 are distal to a portion of blood permeable sac 136 that forms lumen 141. In the February 26, 2007 Advisory Action, the Examiner has attempted to redefine the blood permeable sac 136 to be that portion of the sac 136 that is distal to the hem bond 140 on the basis that the other parts of sac 136 (the hem bond 140 and the lumen 141) do not filter and they are not part of the filter basket. Khosravi does not teach or suggest that only those portions of the sac 136 that are distal to the hem bond are capable of filtering. Appellants respectfully request that the Examiner cite a reference or provide an affidavit under 37 C.F.R. § 1.104(d)(2) to support this contention. The Examiner even appears to concede that the hem bond 140 might be capable of filtering. The Examiner states that “[h]em bond 140 is not capable of filtering or has limited filtering capabilities . . . .” February 26, 2007 Advisory Action. The Examiner has improperly construed Khosravi by contending that only a portion of the blood permeable sac 136 is a filter basket.

The Examiner has construed Khosravi in a fairly convoluted manner. Appellants contend that one of skill in the art would not read Khosravi to teach or suggest a spacing member positioned proximally of the proximal end of the filter basket as recited in the pending claims. One of skill in the art would not view FIGS. 11A to 11C as teaching a spacing member proximal to blood permeable sac 136. Accordingly, Applicants respectfully request that the Examiner withdraw this rejection of the claims.

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### (8) SUMMARY

For the reasons discussed above, claims 71 to 73, 75 to 77, and 79 to 81 are not properly rejected under 35 U.S.C. § 102(e) as anticipated by U.S. Patent No. 6,129,739 to Khosravi.

Appellants respectfully submit that the art cited does not render the claims anticipated or obvious and that the claims are patentable over the cited art. Reversal of the rejection and allowance of the pending claims are respectfully requested.

If any additional fees are due in connection with the filing of this paper, please charge the fees to our Deposit Account No. 16-2312. If a fee is required for an extension of time under 37 C.F.R. § 1.136 not accounted for above, such an extension is requested and the fee should also be charged to our deposit account.

Respectfully submitted,

Date:

April 26, 2007

By



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### CLAIMS APPENDIX

Claims 1 to 70 (Canceled).

71 (Previously presented). A distal protection device disposable within a vessel of a body comprising:

- a guidewire;

- a tube having a lumen sized to receive the guidewire;

- a filter basket connected to the tube, the filter basket having a closed distal end and an open proximal end; and

- a spacing member connected to the tube and positioned proximally of the proximal end of the filter basket, the spacing member being configured to maintain the proximal end of the filter basket in an opened configuration when the device is deployed within the vessel.

72 (Previously presented). The distal protection device of claim 71 wherein the tube is configured for rotational movement along the guidewire.

73 (Previously presented). The distal protection device of claim 71 wherein the tube is configured for rotational and axial movement along the guidewire.

74 (Withdrawn). The distal protection device of claim 71 wherein the tube is fixed to the guidewire.

75 (Previously presented). A distal protection device disposable within a vessel of a body comprising:

- a guidewire;

- a tube having a lumen sized to receive the guidewire;

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a filter basket connected to the tube, the filter basket having a closed distal end and an open proximal end; and

a spacing member having a first portion connected to the tube and a second portion opposite the first portion which is configured to contact an inner wall of the vessel at a point of engagement when the device is deployed in the vessel to space the guidewire a desired distance from the point of engagement, the spacing member being positioned proximally of the proximal end of the filter basket.

76 (Previously presented). The distal protection device of claim 75 wherein the tube is configured for rotational movement along the guidewire.

77 (Previously presented). The distal protection device of claim 75 wherein the tube is configured for rotational and axial movement along the guidewire.

78 (Withdrawn). The distal protection device of claim 75 wherein the tube is fixed to the guidewire.

79 (Previously presented). A distal protection device disposable within a vessel of a body comprising:

a guidewire;

a tube having a lumen sized to receive the guidewire;

a filter basket connected to the tube, the filter basket having a closed distal end and an open proximal end; and

a spacing member having first and second opposing portions, the first portion being connected to the tube, the second portion being configured to contact an inner wall of the vessel at a point of engagement when the device is deployed in the vessel such that the guidewire is urged in a direction away from

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the point of engagement, the spacing member being positioned proximally of the proximal end of the filter basket.

80 (Previously presented). The distal protection device of claim 79 wherein the tube is configured for rotational movement along the guidewire.

81 (Previously presented). The distal protection device of claim 79 wherein the tube is configured for rotational and axial movement along the guidewire.

82 (Withdrawn). The distal protection device of claim 79 wherein the tube is fixed to the guidewire.

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EVIDENCE APPENDIX

None.

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RELATED PROCEEDINGS APPENDIX

None.